United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7364

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UNITED STATES COURT OF APPEALS

For The Second Circuit

GIUSEPPE DI FORTUNATO,

Appellant,

-against-

STOCKHOLM REDERI A/B SVEA, M/V SVENSKUND,

Appellee.

REDERI A/B SATURNAS,

Third Party Plaintiff,

-against-

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third Party Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

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UNITED STATES COURT OF APPEALS

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GIUSEPPE DI FORTUNATO,

Appellant,

- against -

STOCKHOLM REDERI A/B SVEA, M/V SVENSKUND,

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- against-

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

Issues presented for review

1. Where a prospective juror, during the voir dire, withholds information sought to be elicited by the Court's interrogation, which, had it been disclosed, would have resulted in the juror's disqualification, on the ground of bias and prejudice; he is thereafter selected as a juror, and subsequently, during the course of the jury's deliberations, he imparts the information, previously withheld, to the jury, and said information comprises (a) observations made by the juror over a long period of time, as part of his regular employment, of conditions similar to those involved in the case on trial, which plaintiff contends caused his injuries, and for which, plaintiff contends, defendant is responsible, and (b) fixed opinions held by said juror, adverse to plaintiff's theories of liability, concerning the legal effect of said conditions; the remaining members of the jury are persuaded as to the correctness of said opinions, and the entire jury, on the sole basis of said observations and opinions of said juror, completely disregard the instructions of the Court, on the sole basis of said observations and opinions, and, arrive at a verdict in favor of the defendant, is it error for the Court to deny plaintiff's motion to set aside the verdict, and for a new trial, made on the ground of the

juror's disqualification, his concealment thereof, and the prejudice to plaintiff resulting therefrom? The Court below held that it was not error.

2. Where one member of a trial jury informs the other members of the jury of the observations and opinions described in "1" directly above; said observations and opinions are extraneous to [illegible]ssues in the case, and are, moreover, adverse to the plaintiff's theories of liability; the jury is persuaded as to the correctness of said opinions, and the entire jury, on the sole basis of said observations and opinions of said juror, reaches a verdict in favor of defendant, is it error to deny plaintiff's motion to set aside the verdict, and for a new trial -- (1) made on the ground that matters extraneous to the issues were brought to the attention of the jury, and materially influenced their verdict, and (2) supported by the affidavit of plaintiff's trial counsel as to post-verdict disclosures made to him by members of the jury -- is it error for the Court to deny plaintiff's motion, without even ordering an evidentiary hearing, on the ground that the statements of the jurors reflected in said post-verdict disclosures are incompetent and inadmissible? The Court below held that it was not error.

Statement of the case

Nature of the case

Appellant, GIUSEPPE DI FORTUNATO, brought this action for damages for personal injuries sustained by him as a result of the unseaworthiness of a vessel owned, staffed and operated by defendant STOCKHOLM REDERI A/B SVEA, M/V SVENSKUND (hereinafter "REDERI") and the negligence of REDERI.*

REDERI brought a third party action against DI FORTUNATO's employer, INTERNATIONAL TERMINAL OPERATING CO., INC. (hereinafter "INTERNATIONAL"), a stevedore.

Course of the proceedings in the court below

The case was tried to a jury before Hon. ORRIN G. JUDD, District Judge, in the United States District Court for the Eastern District of New York. The jury, in the principal action, returned a verdict in favor of REDERI against DI FORTUNATO, and in the third party action, in

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* Defendant's answer opens by saying, "Defendant REDERI A/B SATURNAS, sued herein as STOCKHOLM REDERI A/B SVEA, M/V SVENSKUND . . ."(p. 12a of appellant's Appendix.

favor of INTERNATIONAL against REDERI. Judgment was entered January 30, 1975.

Ten (10) days later was February 9, 1975, a Sunday. The next day, February 10, 1975, a Monday, DI FORTUNATO moved, pursuant to Rules 59 and 60(b) of the Federal Rules of Civil Procedure, for an order (a) setting aside the verdict in the principal action in favor of REDERI, as well as the judgment entered thereon, and (b) directing a new trial. The motion was prompted by disclosures made to DI FORTUNATO's trial counsel, IRVING B. BUSHLOW (who is also counsel on this appeal), immediately following the verdict, by two members of the jury, a Mr. ALPER and a Mr. MURPHY. Two other members of the jury -- a Mrs. MILLER and a Mr. KNOBAL -- appeared on the scene while Mr. BUSHLOW was engaged in conversation with Mr. ALPER, were invited by Mr. BUSHLOW to join in the conversation, but declined, stating that Mr. ALPER "speaks for all of us."

The disclosures -- which were immediately reported to the District Judge who had presided at the trial -- prompted DI FORTUNATO's trial counsel to move to set aside the verdict and request a new trial, on these two related grounds: First,

notwithstanding interrogation by the District Judge during the voir dire which was designed to elicit such information, Mr. ALPER withheld from the Court and parties facts which, had they been divulged, would have resulted in his disqualification on the ground of bias and prejudice. Specifically, the case involved the loading and unloading of a vessel on which DI FORTUNATO had been injured while unloading bags of tapioca flour. He had slipped and fallen because of the presence of spilled tapioca, due to broken bags; water, dunnage, and broken pallets.

Interrogating the venire , the District Judge inquired whether any of them or members of their families had ever been engaged in loading or unloading vessels. A Mrs. DE LUCA informed the Court that her husband was a longshoreman, and was, for that reason, promptly excused. This took place in the presence of Mr. ALPER.

Mr. ALPER, however, failed to reveal that during World War II he had been attached to an embarkation unit whose function was to get material and supplies to the Army, which necessarily involved the loading and unloading of ships. Mr. ALPER had been regularly and repeatedly present aboard vessels during loading and unloading operations, and had

made numerous observations concerning the presence of spilled and broken cargo, water, dunnage and broken pallets, in the areas where the operations took place, and had formed very pronounced opinions as to whether said conditions rendered the vessels unsafe or dangerous (they didn't he believed), whether the owners of the vessels had any responsibility to correct said conditions (they didn't, he believed), whether it was the responsibility of the men loading and unloading the vessel to correct said conditions (it was, he believed), and whether said workers assumed any risks created by said conditions (they did, he believed).

Manifestly, Mr. ALPER's unique background and opinions disqualified him as a juror. However, since he did not disclose them, he was not disqualified, and, as a result, served on the jury.

The second ground of DI FORTUNATO's motion was that during the course of the jury's deliberations, Mr. ALPER had informed the other members of the jury of his background and opinions; the jurors had decided to subscribe to his opinions, and, as a result, in reaching their verdict against plaintiff, they completely abdicated their functions as jurors and disregarded the Court's instructions in every material respect,

arriving at their verdict soley and exclusively on the basis of Mr. ALPER's observations and opinions.

The motion to set aside the verdict was supported by Mr. BUSHLOW's affidavit concerning said post-verdict disclosures, and a copy of the transcript of the charge and post-charge proceedings, including the verdict, and post-verdict proceedings. Plaintiff, by his motion, did not actually seek or expect to have the verdict set aside on the basis of said papers, but merely sought an evidentiary hearing.

Defendant opposed the motion.

Disposition of the motion

On May 22, 1975, the Court denied the motion.*

The Appeal

On June 11, 1975, plaintiff appealed to this Court from the order denying the motion.

* The Court does not appear, in the "memorandum, decision and order" (one paper), to have given a reason for denying the motion to the extent that it was based upon juror ALPER's concealments of facts during the voir dire. The Court denied the second branch of the motion - that juror ALPER's observations and opinions, which ALPER brought to the attention of the jury, constituted ~~not~~ matters extraneous to the issues, and prejudicial to plaintiff, which had materially influenced the verdict - on the ground that the post-verdict disclosures by the jurors, relied upon by plaintiff, were incompetent and inadmissible.

Facts

The evidence permitted the jury to find the following facts, which are reflected in the Court's instructions:

Plaintiff, GIUSEPPE DI FORTUNATO, a longshoreman employed by the Third-Party Defendant, INTERNATIONAL, a stevedore, was injured while at work on board the vessel owned, staffed and operated by defendant, REDERI (101a,* 21a, 23a, 29a, 30a, 31a, 34a, 38a). He was at the time carrying out the duties of a sorter, checking and marking cargo - specifically, bags of tapioca flour - on the 'tween deck, preparatory to the cargo being unloaded or discharged (101a, 23a, 24a - 25a, 38a). The area in which plaintiff was working was littered with tapioca flour (as a result of having spilled out of torn or broken bags), water (which had accumulated as a result of sweating in the hold due to the closing of the hatch, and/or condensation from refrigeration units in the deep tanks below), dunnage and broken pallets (24a, 25a, 26a, 99a - 100a, 101a, 25a, 38a, 29a). A cargo mate for the vessel was walking back and forth on the deck, and knew that there was some tapioca spillage, but took no action (101a). While engaged in checking and marking

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* Numbers, followed by "a", unless otherwise indicated, refer to pages of appellant's Appendix.

cargo, plaintiff slipped and fell as a result of the presence of said substances (99a - 100a, 38a, 24a, 25a - 26a, 29a).

The Court's instructions concerning unseaworthiness, negligence and contributory negligence

The Court instructed the jury that if they found the substances referred to had been present in the area where plaintiff was at work - and the evidence overwhelmingly warranted the jury in so finding - they should then determine whether or not the condition created by these substances constituted an unsafe and dangerous condition, rendering plaintiff's place of work unfit and unsafe and the ship unseaworthy (24a - 25a, 26a, 27a, 40a - 41a), and/or also constituted negligence on the part of the defendant shipowner (26a, 27a, 29a - 30a). Determination of the latter question depended, in turn, on the jury's determination of the question whether or not defendant knew or should have known of the presence of said substances (26a, 27a, 40a).

The Court further instructed the jury that they were to determine whether or not plaintiff had been guilty of negligence contributing to the accident, and if he had, they should then determine, in percentage terms, from zero to one hundred, the extent to which defendant's negligence and plaintiff's contributory negligence had respectively been responsible for the accident (27a - 29a, 30a, 40a, 23a).

The Court's admonitions to the jury that the verdict was to be predicated solely upon the evidence and the Court's instructions, and that the jury was not to take into consideration matters not in evidence.

The Court admonished the jury that in deliberating upon their verdict, they were to consider only the evidence and the Court's instructions, and that they were not to consider matters not in evidence (18a - 19a).

The verdict in the form of answers by the jury to written interrogatories submitted to them by the Court.

The Court instructed the jury to return a verdict in the form of answers to interrogatories which were contained in a "FORM OF VERDICT" which they were given (45a, 65a - 66a).

The jury, in response to said interrogatories, found (1) that the shipowner was not negligent, (2) that the vessel was not unseaworthy, (3) that plaintiff's negligence had contributed to the accident, and (4) that his negligence had contributed to the accident to the extent of One Hundred (100%) percent (65a - 66a).

The post-verdict disclosures by two of the jurors who returned the verdict

Immediately following the verdict, plaintiff's trial counsel, Mr. Bushlow, spoke to Mr. Alper, juror #6, concerning the verdict (72a, 74a, 78a). While Mr. Bushlow and Mr. Alper were engaged in conversation, two other jurors, Mrs. Miller, juror #5, and Mr. George C. Knobal, Jr., juror #4, appeared, and Mr. Bushlow invited them to join the conversation, but both of them declined, stating that Mr. Alper "speaks for all of us" (80a, 78a). A moment or so later, while Mr. Bushlow and Mr. Alper were still engaged in conversation, juror #1, Mr. Taft Murphy, appeared and joined in the conversation (78a, 80a). Mr. Alper informed Mr. Bushlow of the following facts, and he and Mr. Murphy also told Mr. Bushlow that Mr. Alper had also informed the rest of the jury of said facts (78a-79a, 80a): During World War II, while in the military service of the United States, he had been attached to an embarkation unit. The work of the unit, he said, consisted in getting material and supplies to the army, and involved the loading and unloading of ships.

Mr. Alper stated that he had been present aboard vessels during the loading and unloading operations. During

the entire period of such service, he said, the presence in the hold or holds - more particularly, in work areas - of spilled or broken cargo, water, dunnage and broken pallets, was usual, common, to be expected, and that these conditions did not render the areas where the substances were found either unsafe or dangerous, nor did the conditions place any responsibility upon the owners of the vessels (79a). Furthermore, he added, if said substances were from time to time required to be cleared away, it was the responsibility of the workers to do so, and, in fact, it was the workers who did so (79a).

Moreover, Mr. Alper said, the workers assumed any risk involved in the conditions created by the presence of said substances (79a). Indeed, said Mr. Alper, plaintiff had assumed any risk created by the presence of the spilled or broken cargo, water, dunnage and broken pallets (79a).

Mr. Alper then stated to Mr. Bushlow, with Mr. Murphy standing by and listening, that he, Mr. Alper, had related the foregoing facts of his experiences, observations and knowledge, as well as his aforesaid conclusions and opinions, to the remaining members of the jury, and that they agreed with his conclusions and opinions (78a -79a, 80a).

At this point, Mr. Murphy interjected, stating that Mr. Alper had informed him and the remaining members of the jury of the foregoing facts and opinions, and that in view of Mr. Alper's experience, observations and knowledge in the field of loading and unloading vessels, he, Mr. Murphy, and the remaining members of the jury, had agreed with Mr. Alper's conclusions and opinions (80a).

The foregoing disclosures by Mr. Alper and Mr. Murphy, as stated above, were made to Mr. Bushlow at a time when two other jurors, Mrs. Miller, juror #5, and Mr. Knobal, Jr., juror #4, had appeared while Mr. Bushlow was engaged in conversation with Mr. Alper, and had declined Mr. Bushlow's invitation to join the conversation, but stated that Mr. Alper "speaks for all of us" (80a, 78a).

The immediate report of said events by plaintiff's counsel to the Court

Immediately following said disclosures, Mr. Bushlow returned to the court, where the District Judge was in chambers, and advised him of the foregoing facts (80a - 81a).

The ineligibility of Mr. Alper to serve as a juror, which was not, however, disclosed to the Court or counsel until Mr. Alper's post-verdict disclosures

The voir dire made it unequivocally clear that the Court desired to identify, for the purpose of eliminating members of the venire, or members whose families, were or had been engaged in waterborne commerce, or in loading and unloading vessels - let alone, persons who, like Mr. Alper, had fixed opinions concerning vital matters in the case (86a-87a). Indeed, one person, Mrs. Mary DeLuca, had been excused by the Court, on its own motion, when she revealed that her husband was or had been a longshoreman. Moreover, this had taken place in the presence of Mr. Alper (87a).

Notwithstanding said facts, however, Mr. Alper did not disclose to the Court or counsel that, as shown above, he had during the last World War been attached to an embarkation unit, had been engaged in overseeing the loading and unloading of ships, and had made observations and had formed opinions concerning matters of the same kind as those involved in the case at bar, but adverse to plaintiff's theories of liabilities (87a). Moreover, as indicated above, he had later communicated said observations and opinions to the remaining members of the jury, who had adopted said opinions as their own (78a-79a, 80a).

ARGUMENT

I

IT WAS ERROR FOR THE COURT BELOW TO DENY PLAINTIFF'S MOTION TO SET ASIDE THE VERDICT, AND FOR A NEW TRIAL, MADE ON THE GROUNDS (a) THAT JUROR ALPER HAD, DURING THE VOIR DIRE, CONCEALED FACTS WHICH WOULD HAVE DISQUALIFIED HIM AS A JUROR, NOTWITHSTANDING THE FACT THAT THE COURT'S INTERROGATION WAS PRIMARILY DESIGNED TO ELICIT SUCH FACTS, FOR THE PURPOSE OF DETERMINING WHETHER TO DISQUALIFY PROSPECTIVE JURORS, AND (b) THAT JUROR ALPER DURING THE JURY'S DELIBERATIONS, HAD IMPARTED THE FACTS PREVIOUSLY WITHHELD, TO THE JURY THESE FACTS COMPRISED OBSERVATIONS AND OPINIONS OF JUROR ALPER EXTRANEOUS TO THE ISSUES IN THE CASE, AND HIGHLY PREJUDICIAL TO PLAINTIFF, AND (c) THE ENTIRE JURY, ON THE SOLE BASIS OF SAID OBSERVATIONS AND OPINIONS OF JUROR ALPER, HAD REACHED A VERDICT IN FAVOR OF DEFENDANT.*

There can be little question that juror ALPER was disqualified to serve on the jury, and as a matter of law. The case involved loading and unloading operations aboard a vessel, and conditions which plaintiff claimed had caused his injuries -- namely, spilled or broken cargo, water, dunnage and broken pallets -- and for which, plaintiff contended, defendant was responsible. (pp. 9-10, supra). The Court specifically interrogated the venire as to whether they or any members of their family had ever engaged in loading or unloading operations. (p. 15, supra). One prospective juror, a Mrs. DE LUCA, was excused when she informed the Court that her husband was a longshoreman. (id.). This took place in the presence of juror ALPER. (id.).

*See p. 8, supra, footnote, with "memorandum, decision and order" (memorandum, 98a-105a). The Court does not appear to have given any reason for denying the branch of the motion bottomed on ALPER's concealment of facts during the voir dire.

While it is true that juror ALPER had never personally engaged in loading or unloading operations, nevertheless, his regular and repeated observations of said operations and conditions -- namely broken or spilled cargo, water, dunnage, and broken pallets—and the fixed opinions which he held concerning the legal effect of such conditions, which were plainly adverse to plaintiff's theories of liability/-- (pp. 12-14, supra) all this, we submit, made it incumbent upon him to advise the Court and the parties concerning his observations and opinions. Had he done so, there can be little question but that the Court would have promptly disqualified him.

The prejudice to plaintiff resulting from the fact of his disqualification and his concealment thereof, is well-nigh incalcuable, in view of the fact that during the jury's deliberations, juror ALPER imparted to the other members of the jury the information he had previously withheld, with disastrous results for the plaintiff/. (78a-79a, 80a). That information consisted of said observations and opinions; the other members of the jury were convinced that the opinions were correct, and, as a result, they disregarded the Court's instructions in every material respect, and, on the sole basis of juror ALPER's observations and opinions, arrived at a verdict in favor of the defendant. (cf. pp. 12-14, supra, and pp. 10-11, supra).

In the light of all the foregoing circumstances, it was plainly error for the Court below to deny plaintiff's motion to set aside the verdict, and for a new trial, made on the ground of juror ALPER's concealment of his disqualification, and the prejudice resulting to plaintiff therefrom. Reynolds v. United States, 98 U.S. 145, 154-157; see p. 155; Morrison v. Ted Wilkerson, Inc., 343 F. Supp. 1319, 1331-132 (D.C.W.D. Missouri; 1971); Beanland v. Chicago, Rock Island & Pacific Railroad Company, 345 F. Supp. 227 (D.C.W.D. Missouri; 1972); King-Size Publications, Inc. v. Ameridan News Co., 194 F. Supp. 109 (cert.den.), 368 U.S. 920 (D.C.N.J.; 1961).

II

IT WAS ERROR FOR THE COURT BELOW TO DENY, WITHOUT EVEN AN EVIDENTIARY HEARING, PLAINTIFF's MOTION TO SET ASIDE THE VERDICT, AND FOR A NEW TRIAL - MADE ON THE GROUND THAT MATTERS EXTRANEOUS TO THE ISSUES HAD BEEN BROUGHT TO THE ATTENTION OF THE JURY, AND HAD MATERIALLY INFLUENCED THEIR VERDICT - ON THE GROUND THAT THE POST-VERDICT DISCLOSURES OF THE JURORS . RELIED UPON BY THE PLAINTIFF, WERE INCOMPETENT AND INADMISSIBLE

There can be little question that juror Alper's observations and opinions concerning the legal effect of conditions such as spilled or broken cargo, water, dunnage and broken pallets, in relation to the rights of shipowners and longshoremen - opinions which were adverse to plaintiff's theories of liability - constituted matters extraneous to the issues and highly prejudicial to plaintiff. The prejudice to the plaintiff became monumental when the other members of the jury became convinced of the correctness of juror Alper's opinions, and the entire jury, solely on the basis of juror Alper's opinions and observations, disregarded the instructions of the Court, and, upon the sole basis of said opinions and observations, rendered a verdict for defendant (cf. pp. 12-14, SUPRA, and pp 10-11, SUPRA).

The court below denied plaintiff's motion to set aside the verdict, and for a new trial - made on the ground that jurorAlper's opinions and observations constituted matters extraneous to the issues which had materially influenced the jury in arriving at a verdict - on the ground that the post-verdict disclosures of the jurors, relied upon by plaintiff, were incompetent and inadmissible. (#102a-105a).

We respectfully submit that the court below erred in so doing. Rule 606 of the Federal Rules of Evidence, which bars jurors' testimony for the purpose of impeaching their verdict, provides a narrow exception which covers the case at bar. Rule 606 states that a juror may testify

> "on the question of whether or not extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror".

We respectfully submit that juror Alper's opinions and observations, which were brought to the jury's attention and resulted in their verdict for the defendant, constituted "extraneous prejudicial information" within the meaning of the Rule. In Marshall v United States, 360 U.S. 310, a jury verdict was set aside and a new trial granted because newspaper articles prejudicial to the defendant had been brought to the attention of the jury during the trial. Manifestly,

the rationale of the Court's decision was that matters extraneous to the issues had been brought to the attention of the jury and had materially influenced their verdict. We fail to preceive any distinction between newspaper articles concerning a party, which are plainly foreign to the issues in a case,and jurcrAlper's opinions and observations, which were equally foreign to the issues in the case at bar. We submit that the case at bar is one of those cases which the United States Supreme Court had in mind when it wrote in United States v Reid, 53 U.S. 361, 366:

> "(C)ases might arise in which it would be improper to refuse (evidence of impropriety)" - in the deliberationsof the jury - "without violating the plainest principles of justice" (matters between dashes supplied).

The foregoing extract from United States v Reid, supra, was quoted by this Court in United States v Dioguardi, 492 F2d 70, 79, note 12.

Conclusion

The order appealed from should be reversed, and plaintiff's motion to set aside the verdict, and for a new trial, should be granted to the extent of directing that an evidentiary hearing be held, at which the jurors' post-verdict

statements and disclosure should be admitted.

Respectfully submitted,

IRVING B. BUSHLOW
Attorney for Appellant

RULE 59. NEW TRIALS; AMENDMENT OF JUDGMENTS

Analysis

A. IN GENERAL

B. GROUNDS

C. PROCEDURE

D. APPELLATE REVIEW

Text of Rule 59

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take addi-

tional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) **Time for Motion.** A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) **Time for Serving Affidavits.** When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) **On Initiative of Court.** Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) **Motion to Alter or Amend a Judgment.** A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment. As amended Dec. 27, 1946, eff. March 19, 1948; [1] Feb. 28, 1966, eff. July 1, 1966.[2]

A. IN GENERAL

§ 2801. History and Purpose of Rule

Rule 59 recognizes the common law principle that it is the duty of a judge who is not satisfied with the verdict of a jury

1. **1948 amendment**

Subdivision (e) was added and subdivision (b) was amended by striking out the former exception with respect to motions for new trial for newly discovered evidence. This subdivision before the amendment was as follows:

"**(b) Time for Motion.** A motion for a new trial shall be served not later than 10 days after the entry of the judgment, except that a motion for a new trial on the ground of newly discovered evidence may be made after the expiration of such period and before the expiration of the time for appeal, with leave of court obtained on notice and hearing and on a showing of due diligence."

2. **1966 amendment**

Subdivision (d) was amended in 1966 by deleting from the end of what is now the first sentence the words "and in the order shall specify the grounds therefor" and adding the second and third sentences.

RULE 60. RELIEF FROM JUDGMENT OR ORDER

Analysis

A. IN GENERAL

B. RELIEF UNDER SUBDIVISION (a)

C. RELIEF UNDER SUBDIVISION (b)

D. OTHER METHODS OF RELIEF

E. APPELLATE REVIEW

Text of Rule 60

(a) **Clerical Mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate

court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

As amended Dec. 27, 1946, eff. March 19, 1948;[1] Dec. 29, 1948, eff. Oct. 20, 1949.[2]

1. **1948 amendment**

Rule 60 was rewritten with more particularity and specification. The rule before amendment was as follows:

"(a) **Clerical Mistakes.** Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

"(b) **Mistake; Inadvertence; Surprise; Excusable Neglect.** On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in Section 57 of the Ju-

2. See note 2 on page 140.

STATE OF NEW YORK
COUNTY OF NEW YORK

[illegible] being duly sworn deposes and says: On [illegible], 19[illegible] I served the within ~~record on appeal~~ brief ~~appendix~~ on [illegible] the attorney for the ~~respondent~~ by leaving ~~mailing~~ ~~three~~ copies thereof at his office located at [illegible]

[illegible]

Sworn to before me
this [illegible] day of
[illegible], 19[illegible]

[illegible]

JILLIAN WEISBERG
COMMISSIONER OF DEEDS
CITY OF NEW YORK 4-1401
Certificate filed in New York County
Commission Expires September 1, 1976

STATE OF NEW YORK
COUNTY OF NEW YORK

[illegible] being duly sworn deposes and says: On [illegible], 19[illegible] I served the within ~~record on appeal~~ brief ~~appendix~~ on [illegible] the attorney for the ~~respondent~~ by leaving ~~mailing~~ ~~three~~ copies thereof at his office located at [illegible]

[illegible]

Sworn to before me
this [illegible] day of
[illegible], 19[illegible]

[illegible]

JILLIAN WEISBERG
COMMISSIONER OF DEEDS
CITY OF NEW YORK 4-1401
Certificate filed in New York County
Commission Expires September 1, 1976